CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

U.S. Customs Service

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Slip Op. 98–127 and 98–128

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 16, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

PATRICIA TODARO,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO THE CLASSIFICATION OF KNOTTED NET BALL BAGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter concerning the tariff classification of a knotted net ball bag.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of knotted net ball bags. Customs invites comments on the correctness of this proposal.

DATE: Comments must be received on or before October 30, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION: Phil Robins, Textile Branch, Office of Regulations and Rulings, 202–927–1031.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of knotted net ball bags. Customs invites comments on the correctness of this proposal.

New York ruling letter C86007, dated April 15, 1998, concerned the classification of a knotted net ball bag under the HTSUS. The item is a knotted net of man-made fibers that is shaped to hold a volley ball, or ball of similar size. A length of cord is threaded through the top of the net and then through a small spring operated plastic holder. The holder can then be used to adjust the cord so as to fit around a person's waist.

In NY C86007, Customs incorrectly concluded the applicable HTSUS subheading was 5609.00.3000, which provides for articles of yarn, twine, cordage, rope or cables, not elsewhere specified or included, of man made fibers. NY C86007 is set forth as "Attachment A" to this document. It is now Customs position that the most appropriate subheading is 5608.19.2090 because the General Rules of Interpretation (GRI) 1 state that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *". In this case heading 5608 provides for knotted netting to include made up fishing nets and other made up nets of textile materials; as opposed to 5609 which provides for articles of yarn, twine, cordage, rope or cables not elsewhere specified or included.

The Harmonized System also provides Section Notes (SN's) which are legal notes that provide definitions or information on the scope of pertinent provisions or set additional requirements for classification purposes. In Section XI, HTSUS, SN 7 indicates, in part, that the expression "made up" means that the article is "Cut otherwise than in to squares or rectangles; * * * Assembled by sewing, gumming or otherwise". The knotted net ball bag meets the requirement of "made up" as set forth by SN 7 used in evaluating artcles under heading 5608. The explanatory notes to 5608 further support this revocation by indicating in sub-section 2 that "made up articles of this group may be made of yarn and the open mesh may be obtained by knotting * * * [and] made up nets are nets, whether or not ready for use, made directly to shape or assembled from pieces of netting." The subsection continues by stating that the presence of handles, rings, weights, floats, cords or other accessories does not affect the classification of goods of this group" and that the heading includes "net shopping bags and similar carrying nets (e.g.,

for tennis balls or footballs)". Proposed Headquarters Ruling Letter 961983 is set forth as "Attachment B" to this document.

Prior to taking this action we will give consideration to any written comments received in a timely manner. Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of the publication of this notice.

Dated: September 14, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Director.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, April 15, 1998.

CLA–2–56:RR:NC:TA:351 C86007
Category: Classification
Tariff No. 5609.00.3000

MS. PAMELA PINTER
BIG APPLE CUSTOMS BROKERS, INC.
151–02 132nd Avenue
Jamaica, NY 11434

Re: The tariff classification of a net soccer ball waist bag from Taiwan.

DEAR MS. PINTER:

In your letter dated March 27, 1998, you requested a classification ruling on behalf of Regent Sports Corporation.

The item is described as a "Ball Net Carry Bag", item 020–79665. It is a knotted net shaped to hold a volley ball or a ball of similar dimensions. A length of cord is threaded through the top of the net. This cord is also threaded through a small plastic holder which is spring operated. By pulling on the plastic device, one can adjust the cord length to fit around a person's waist. The net and cord are of man-made material. A sample was submitted.

The applicable subheading for the net bag will be 5609.00.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of yarn, strip or the like, * * *, twine, cordage, rope or cables, of man-made fibers. The duty rate will be 7.2 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Camille Ferraro at 212–466–5885.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 961983 DNM
Category: Classification
Tariff No: 5608.19.2090

MS. PAMELA PINTER
BIG APPLE CUSTOMS BROKERS, INC.
151–02 132nd Avenue
Jamacia, NY 11434

Re: Reconsideration of NY C86007; concerning the tariff classification of a knotted net ball bag.

DEAR MS. PINTER:

This is in reference to NY C86007, which was issued by the Director, National Commodity Specialist Division, New York, New York on April 15, 1998. The ruling classified a knotted net ball bag under subheading 5609.00.3000, Harmonized Tariff Schedule of the United States (HTSUS) which provides for articles of yarn, twine, cordage, rope or cables, not elsewhere specified or included, of man-made fibers. We have reviewed NY C86007 and have determined that the ruling's holding regarding the classification is incorrect. Our decision is as follows:

Facts:

The article in issue is a knotted net of man-made fibers that is shaped to hold a volley ball, or ball of similar size. A length of man-made cord is threaded through the top of the net and then through a small spring operated plastic holder. The holder can then be used to adjust the cord so as to fit around a person's waist.

The provisions under consideration are as follows:

5608	Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials:
5608.19	Other:
5608.19.2090	Other: Other * * * 8%
* * * * * * *	
5609.00	Articles of Yarn * * * twine cordage, rope or cables, not elsewhere specified or included:
5609.00.3000	Of man-made fibers * * * 7.2%

Issue:

Whether the knotted net ball bag is classifiable in subheading 5609.00.3000, HTSUS, or in subheading 5608.19.2090, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) taken in their appropriate order provide a framework for classification of merchandise under the HTSUS. GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *" In this case heading 5608 provides for knotted netting including made up fishing nets and other made up nets of textile materials; as opposed to 5609 that provides for articles of yarn, twine, cordage, rope or cables not elsewhere specified or included. The heading 5608 more accurately describes the knotted net ball bag.

The Harmonized System provides Section Notes (SN's) which are legal notes that provide definitions or information on the scope of pertinent provisions or set additional requirements for classification purposes. In the notes to Section XI, HTSUS, SN 7 indicates, in part, that the expression "made up" means that the article is "Cut otherwise than into squares or rectangles; * * * Assembled by sewing, gumming or otherwise." The knotted net ball bag meets the requirement of "made up" as set forth by SN 7.

The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope

of the headings and the GRI's. The EN to 5608 further supports this revocation by indicating in subsection 2 that "made up articles of this group may be made of yarn and the open mesh may be obtained by knotting * * * [and] made up nets are nets, whether or not ready for use, made directly to shape or assembled from pieces of netting." The subsection continues by stating that the presence of handles, rings, weights, floats, cords or other accessories does not affect the classification of goods of this group" and that the heading includes "net shopping bags and similar carrying nets (e.g., for tennis balls or footballs)". The cord and the plastic spring clip, that are part of the knotted net ball bag, are accessories, as related in the explanatory notes, and do not merit further consideration.

Holding:

The knotted net ball bag is properly classified under heading 5608.19.2090, HTSUSA, providing for "Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials: Other: Other: Other." The applicable rate of duty is 8 percent *ad valorem* and the Textile Category is 229.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Director,

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF GLASS "PREFORMS" USED TO PRODUCE OPTICAL FIBER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain glass articles, called "preforms," from which optical fiber is drawn. Notice of the proposed revocation was published on July 1, 1998, in the CUSTOMS BULLETIN, vol. 32, no. 26. Three comments were received in response to this notice.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 30, 1998.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, General Classification Branch, Office of Regulations and Rulings (202) 927–1172.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 1, 1998, Customs published in the CUSTOMS BULLETIN, vol. 32, no. 26, a notice of a proposal to revoke New York Ruling Letter (NY) B85983 dated June 18, 1997, which held that glass preforms, described as solid glass rods made from fused silica and not ground or shaped, to be used as an intermediate product in the process of optical fiber manufacture, were classifiable in subheading 7002.20.10, HTSUS, as unworked glass in rods, of fused quartz or other fused silica. Customs Headquarters reviewed this ruling and proposed revocation of it with the issuance of a new ruling, Headquarters Ruling Letter (HQ) 960948, holding that the preforms are classified in subheading 7020.00.60, HTSUS, as other articles of glass, other.

Three comments were received in response to the proposal. Two comments contend that NY B85983 is correct and should not be revoked. The third comment contends that NY B85983 is incorrect but that instead of being classified as other articles of glass in subheading 7020.00.60, HTSUS, the glass preforms should be classified as unfinished optical fibers in subheading 9001.10.00, HTSUS. The comments are thorough and very helpful in achieving the purpose of the notice-and-comment procedures provided for in 19 U.S.C. 1625(c)—consideration of the correctness of the proposed ruling. The comments are more fully discussed in HQ 960948 attached to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the NAFTA Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs is revoking NY B85983 to reflect the proper classification of the glass preforms in subheading 7020.00.60, HTSUS, as other articles of glass. HQ 960948, as published in the CUSTOMS BULLETIN as Attachment B to the July 1, 1998, notice of proposed revocation, is modified to address the comments received in reponse to the notice. As so modified, HQ 960948 revoking NY B85983 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 11, 1998.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 11, 1998.

CLA-2 RR:CR:GC 960948 PH
Category: Classification
Tariff No. 7002.20.10,
7020.00.60, and 9001.10.00

MS. MARY E. GILL
LUCENT TECHNOLOGIES
Guilford Center 1—3A10
5420 Millstream Road
Greensboro, NC 27420

Re: NY B85983 revoked; glass rods; unworked; other articles of glass; optical fiber; preforms; incomplete or unfinished; essential character; Note 2(a), Chapter 70; GRI 2(a); ENs Rule 2(a)(II); 70.02; 90.01; *Blakley Corp. v. United States*; *Ugg International, Inc. v. United States*; *Winter-Wolff, Inc., v. United States*; *Sharp Microelectronics Technology, Inc. v. United States*; *Superior Wire v. United States.*

DEAR MS. GILL:

On June 18, 1997, New York Ruling Letter (NY) B85983 was issued to you concerning "glass preforms" made from fused silica. You were advised that the merchandise was classifiable in subheading 7002.20.1000, Harmonized Tariff Schedule of the United States (HTSUS), as glass rods, unworked, of fused quartz or other fused silica.

This letter is to inform you that NY B85983 no longer reflects the view of Customs. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NY B85983 was published on July 1, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 26. Our position, set forth below, addresses the comments received in response to the notice.

Facts:

NY B85983 described the merchandise, "glass preforms", as solid glass rods made from fused silica. According to NY B85983, the glass preforms are the rods from which glass optical fiber is fabricated.

Optical fiber consists of "[a] long thin strand of transparent glass, plastic, or other material usually consisting of a fiber optical core and a fiber optical cladding capable of conducting light along its axial length by internal reflection" (U.S. International Trade Commission (USITC) Publication 2851, February 1995, *Industry & Trade Summary, Optical Fiber, Cable, and Bundles*, B–2). The core and the cladding of optical fibers always have a different refractive index ("[a] key design feature of all optical fibers is that the refractive index of the core is higher than the refractive index of the cladding" (*Fiber Optic Reference Guide*, David R. Goff (1996), 11). A glass preform such as those under consideration is "* * * a magnified version of the fiber to be drawn from it" (USITC Publication 2851, *supra*, B–2). That is, the optical characteristics (including attenuation, dispersion, single or multi-mode, and wavelength (*Fiber Optic Reference Guide*, *supra*, at 20–30; *Just the Facts, A basic overview of fiber optics*, Corning (1995), at 15–19; *McGraw-Hill Encyclopedia of Science & Technology* (6th ed. 1987), vol. 12, 414–415, *Optical fibers*)) of the optical fiber which will be drawn from the preform are determined by the preform.

The manufacturing process for producing preforms is generally described as follows in the *Kirk-Othmer Encyclopedia of Chemical Technology* (4th ed., vol. 4 (1994) *Glass*, 555, 615):

> * * * [P]ure chlorides are entrained in an oxygen carrier-gas system, accurately metered, transported, and then react at temperatures about 1500°C. The chloride reaction with oxygen, to form the desired oxides plus chlorine gas, is virtually homogeneous and produces a finely divided particulate glass material commonly called soot. * * * The glass soot is formed into solid inclusion-free glass bodies, which are then heated to temperatures where the glass is fluid enough to be drawn into optical fibers.

The preforms under consideration are produced by a two-step process. In the first step, the core layer of the preform is produced by a method called "Vapor Axial Deposition" (VAD). Extremely fine "dusts" or "soots" of silica tetrachloride and additional chemicals are grown or deposited on the end of a "target" rod, forming a column of the "dust" or "soot" material. The column is drawn though a furnace, fusing it into a rod and releasing the chlorine. In the second step, the cladding layer of the preform is added by fusing to the outside of the core rod a layer of silica dioxide powder. Such a two-step production process is described in *Kirk-Othmer, supra*, 616, as follows:

> * * * Sometimes a two-step process can be employed for efficiency. A preform is made which is roughly half core and half cladding. The sintered preform is then drawn into rod and then overclad with pure silica soot to obtain the appropriate core/clad ratio.

After deposit of the silica dioxide powder or soot to form the cladding layer of the preform, the "target" rod on which the core layer was deposited or grown is removed. This phase of the process is described in *Fiber Optic Reference Guide, supra*, 16, as follows:

> * * * When the deposition is complete, the rod is removed, and the deposited material is placed into a consolidation furnace. The water vapor is removed, and the preform is collapsed to become dense, transparent glass.

The core and cladding of the preform consist of glass with different refractive indexes. *Kirk-Othmer, supra*, at 615, describes the respective refractive indexes and materials of a typical single-mode fiber (according to *Kirk-Othmer, supra*, at 614, more than 90% of the optical fiber market is comprised of single-mode fiber) as follows:

> The core, which has a step refractive index profile, is an 8 wt % GeO_2 + 92 wt % SiO_2 glass. The germania raises the refractive index to about 1.4585. The refractive index of the pure silica cladding is about 1.4534. That difference in refractive index is sufficient to guide the laser light with minimum distortion.

The resulting article, in the form of a rod approximately 62 millimeters in diameter and 1500 millimeters in length, may be flame polished using an oxyhydrogen flame to achieve a smooth surface, if necessary.

To produce optical fiber from the preform, the preform is heated and drawn into a continuous strand of "hair-thin" optical fiber (*Fiber Optic Reference Guide, supra*, at 15). In USITC Publication 2851, *supra*, the process is described as follows:

> * * * The preform descends from a platform just below the top of a vertical draw tower into a furnace heated at very high temperatures to soften the glass. The softened glass is drawn by gravity to produce a fiber that is captured on spinning capstans and wheels [at 1, footnote 3].

A single preform can yield more than 30 miles of fiber (see *Collier's Encyclopedia* (1996), vol. 9, *Fiber optics*, "[a] two-foot (60–cm) tube can yield more than 30 miles (50 km) of fiber").

The optical fiber which is drawn from the preform is then protectively coated. See *Fiber Optic Reference Guide, supra*, at 15–16:

> The optical fiber is encased in several protective layers to ensure integrity under various conditions. The first layer is applied to the glass fiber as it is drawn from the preform. This coating is generally made of ultraviolet-curable acrylate or silicone, and it serves as a moisture shield and as mechanical protection during the early stages of cable production. A secondary buffer is often extruded over the primary coating to further improve the fiber's strength.

See also, *Just the Facts, A basic overview of fiber optics, supra*, p. 8, *Coating*.

The subheadings under consideration are as follows:

> 7002.20.10: Glass in balls (other than microspheres of heading 7018), rods or tubes, unworked: * * * Rods: Of fused quartz or other fused silica.

The 1998 general column one rate of duty for goods classifiable under this provision is 0.9% *ad valorem*.

> 7020.00.60: Other articles of glass: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 5.3% *ad valorem*.

9001.10.00: Optical fibers and optical fiber bundles: optical fiber cables other than those of heading 8544 * * *: Optical fibers, optical fiber bundles and cables.

The 1998 general column one rate of duty for goods classifiable under this provision is 7% *ad valorem*.

Issue:

Whether the glass preforms are classifiable as unworked glass in rods in subheading 7002.20.10, HTSUS, other articles of glass in subheading 7020.00.60, HTSUS, or optical fibers in subheading 9001.10.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) provides, in pertinent part, that:

> (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the *Federal Register* August 23, 1989 (54 FR 35127, 35128).

The preforms have the shape of a rod (see *Webster's New World Dictionary* (3rd Coll. Ed. 1988) *rod* "3 any straight, or almost straight, stick, shaft, bar, staff, etc., of wood, metal, or other material * * *"). To be classifiable as glass in rods in subheading 7002.20.10, the preforms must be "unworked."

Note 2(a), Chapter 70, HTSUS, provides that:

> For the purposes of headings 7003, 7004 and 7005 * * * [g]lass is not regarded as "*worked*" by reason of any process it has undergone before annealing[.]

As for the issue of whether this definition applies to heading 7002, the Court in *Blakley Corp. v. United States*, CIT Slip Op. 98–94 (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, 45), considered a similar issue (whether the definition of the term "slab" in Additional U.S. Note 1 of Chapter 68, HTSUS, applies throughout Chapter 68 or only for purposes of heading 6802, as provided in the Note). The Court stated that "Congress' intent to limit the descriptions contained in Notes 1 and 2 [defining "tiles" for purposes of heading 6810] could scarcely be made more clear" (CUSTOMS BULLETIN, July 29, 1998, vol. 32, no. 30, at 50). Similarly, in this case, Congress' intent to limit the description contained in Note 2(a) to the named headings (*not* including heading 7002) could scarcely be made more clear. The limitation of "worked" in Note 2(a), Chapter 70, HTSUS, is inapplicable to heading 7002, HTSUS.

EN 70.02 states, in part, that:

> This heading covers * * * [g]lass rods and tubing of various diameters, which are generally obtained by drawing (combined with blowing in the case of tubing); they may be used for may purposes (e.g., for chemical or industrial apparatus; in the textile industry; for further manufacture into thermometers, ampoules, electric or electronic bulbs and valves, or ornaments). Certain tubes for fluorescent lighting (used mainly for advertising purposes) are drawn with partitions running through the length.
>
> * * * * * * *
>
> Balls of this heading must be unworked; similarly rod and tubing must be unworked (i.e., as obtained direct from the drawing process or merely cut into lengths the ends of which may have been simply smoothed).
>
> The heading **excludes** balls, rod and tubing made into finished articles or parts of finished articles recognisable as such; these are classified under the appropriate heading (e.g., **heading 70.11, 70.17** or **7018**, or **Chapter 90**). If worked, but not recognisable as being intended for a particular purpose, they fall in **heading 70.20.**
>
> This heading includes tubes (whether or not cut to length) of glass which has had fluorescent material added to it in the mass. On the other hand, tubes coated inside

with fluorescent material, whether or not otherwise worked, are **excluded (heading 70.11)**.

Basically, the preforms under consideration are manufactured by depositing a powder or soot of silica tetrachloride and additional chemicals on a "target" glass rod to form a column of silica tetrachloride powder (with the additional chemicals). The column is drawn through a furnace, resulting in a rod of fused silica dioxide and the additional chemicals and the release of the chlorine gas. Onto this rod is deposited powder or soot of silica dioxide which is fused on the outside of the core rod. The "target" rod is removed and the result is a solid rod of silica glass consisting of a core and cladding, each of different materials and with a different refractive index. This solid rod may be flame polished to achieve a smooth surface.

The preforms are not "unworked", as that term is defined in EN 70.02. That is, discounting "work" on the "target" rod which is removed from the preform and is not imported, according to the importer's description, a rod of the core soots is created in the first step of manufacture. That rod is then "worked" by the addition to it of cladding soots which are fused onto it. These cladding soots make up a layer of glass over the core rod which has different characteristics than the core rod. The core rod with cladding is then further "worked" by the removal of the "target" rod. Clearly, the preform is not "as obtained directly from the drawing process" (EN 70.02, above). Instead of being an article as obtained directly from a simple manufacturing process, as described in EN 70.02 (*e.g.*, moulding, pressing, drawing, blowing), the preform is obtained from a complex manufacturing process in which a rod is first created and then "worked" (in this regard, see, *e.g.*, the distinction in the EN between tubes of glass which have had fluorescent material added to in the mass, included in heading 7002, and tubes coated inside with fluorescent material, excluded from heading 7002). Furthermore, even after the core rod is "worked" with the addition of the cladding layer and the removal of the "target" rod, according to the importer the article may be further "worked" by flame polishing (in this regard, we note the limitation in EN 70.02 on the working of articles in heading 7002 to "merely cut[ting] into lengths *the ends* of which may have been simply smoothed" (emphasis added; note that this provision permits only "the ends" to be simply smoothed)).

This interpretation of the term "unworked" in heading 7002 is consistent with the general treatment of merchandise in different stages of manufacture (see Ruth Sturm, *Customs Law & Administration*, 3rd ed. (1993), §54.3, "[t]here is often a progression of increasing duties from the raw material through various intermediate stages to the article manufactured from the original material"; see also, *Ugg International, Inc. v. United States*, 17 CIT 79, 85–86, 813 F. Supp. 848 (1993)). It is also consistent with a recent case of the Court of International Trade. In *Winter-Wolff, Inc., v. United States*, CIT Slip Op. 98–15 (*Customs Bulletin and Decisions*, March 25, 1998, vol. 32, no. 12, 71), the Court interpreted the term "further worked" as it appears in subheading 7607.11.30, HTSUS. After determining that the common meaning of the term was applicable (*ibid* at 74–75, on the basis of the presumption that the commercial meaning of a term is the same as its common meaning unless the party who argues that the meanings are different proves that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade"), the Court reviewed the dictionary meaning of the words. The Court concluded:

> When cobbled together, this dictionary meaning amounts to the following: to form, fashion, or shape an existing product to a greater extent." [*ibid* at 79.]

The production process for the preforms exactly meets this definition. An existing product (the core rod) is formed, fashioned, or shaped to a greater extent (by deposition of cladding soots on it and fusing of those soots to it, removal of the "target" rod, and after that by flame polishing as necessary).

Accordingly, on the basis of EN 70.02 and the Court's analysis of "further worked" in *Winter-Wolff, supra* (based on the common and commercial meaning of the term), we conclude that the preforms do not qualify as "unworked" for purposes of heading 7002, HTSUS. Therefore, they may not be classified under subheading 7002.20.10, HTSUS.

We note that this position is not inconsistent with the history of consideration of this issue at the Customs Co-operation Council (CCC) during the drafting of the EN (see CCC Documents 31.738, August 31, 1984; 31.820, September 21, 1984; and 32.550/32.551, Annex D/9). CCC Document 31.738 is a report of a proposal by the Canadian administration that glass preforms such as those under consideration be classified in heading 7020 and that the EN for that heading be amended to specifically so provide. According to the CCC

Document, the Secretariat was of the opinion that the preforms were classifiable in heading 7002 and that heading 7020 could be discounted. The CCC Document states that if the view of the Secretariat was accepted, a reference should be added to EN 70.02, stating that the heading includes the glass preforms.

As stated above, CCC Document 31.738 contains a *proposal* regarding the classification of glass preforms. Subsequent CCC documents describe the action taken in response to this proposal. CCC Document 31.820, September 21, 1984, reported that consideration of the question was being deferred for further study. CCC Document 32.550/32.551, Annex D/9 reported the final action on the proposal, stating that the Nomenclature Committee had decided, by a 9 to 4 vote, that the preforms were classifiable in heading 7020 and that the Interim Harmonized System Committee (IHSC) had decided, by a 6 to 5 vote, that they were classifiable in heading 7002. In view of this situation, the document reports that "it was decided that the question should remain outstanding and no reference be made in the [EN]." Thus, this history is inconclusive as to classification of the glass preforms in heading 7002 or 7020.

Optical fibers covered by subheading 9001.10.00, HTSUS, are described in EN 90.01 as follows:

> **Optical fibres** consist of concentric layers of glass or plastics of different refractive indices. Those drawn from glass have a very thin coating of plastics, invisible to the naked eye, which renders the fibres less prone to fracture. Optical fibres are usually presented on reels and may be several kilometers in length. * * *

Because a preform is "* * * a magnified version of the fiber to be drawn from it" (USITC Publication 2851, *supra*, B–2) and determines the optical characteristics of the optical fiber which will be drawn from it (see above), it may be argued that, on the basis of GRI 2(a), the preforms are classifiable in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber. To be classified as an incomplete or unfinished article under GRI 2(a), the article must have the essential character of the complete or finished article.

In determining the essential character of an article under the HTSUS, the Courts have looked to the function or use of the article. See *Sharp Microelectronics Technology, Inc. v. United States*, 932 F. Supp. 1499, 1504–1505 (CIT 1996), *affirmed* 122 F.3d 1446 (1997), in which the Court cited the applicable EN to determine that the essential character, for purposes of GRI 2(a), of automatic data processing machines under heading 8471 is given by "* * * the ability to process data * * *." See also *Mita Copystar America, Inc. v. United States*, CIT Slip Op. 97–73 (1997); *Better Home Plastics Corp. v. United States*, CIT Slip Op. 96–35 (1996), *affirmed*, CAFC Appeal No. 96–1322 (1997); and *Vista International Packaging Co., v. United States*, 19 CIT 868 (1995), in which the Court looked to the role of the constituent material in relation to the use of the goods of which the material was a part in determining essential character, for purposes of GRI 3(b).

The function or use of optical fibers is to transmit information in the form of light through very thin flexible strands (see *Random House Unabridged Dictionary* (2d ed. 1993), "**optical fiber,** a very thin flexible glass or plastic strand along which large quantities of information can be transmitted in the form of light pulses: used in telecommunications, medicine, and other fields"; see also USITC Publication 2851, *supra*, B–2, defining "Optical Fiber" as "[a] long thin strand of transparent glass, plastic, or other material usually consisting of a fiber optical core and a fiber optical cladding capable of conducting light along its axial length by internal reflection"; and *Fiber Optic Reference Guide*, *supra*, at 11 ("[o]ptical fibers are extremely thin strands of ultra-pure glass designed to transmit light from a transmitter to a receiver").

Although the optical characteristics of the optical fiber may be determined by the preform from which the fiber is drawn, the preform does not have the essential physical characteristics necessary for practical use as optical fiber. It is neither thin nor flexible (in regard to the latter, we understand that "the recognized industry-standard bend diameter" provides for the looping of fiber with bend diameters as small as two inches (*Just the Facts, A basic overview of fiber optics*, *supra*, page 15, *Bending Parameters*)). These characteristics (thinness and flexibility) are necessary for the usages of optical fibers (see USITC Publication 2851, *supra*, at 1, wherein it is stated "[o]ptical fiber systems now carry the bulk of long-distance telecommunications traffic in the United States," and other communication uses are described; the relatively thick, inflexible preform simply could not be so used). The statement in EN 90.01 that "[o]ptical fibres are usually presented on reels and may be several kilometers in length" supports the treatment of thinness and flexibility as essential characteristics of optical fibers.

EN GRI Rule 2(a)(II) provides that:

> The provisions of this Rule also apply to **blanks** unless these are specified in a particular heading. The term **"blank"** means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part (e.g., bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).
>
> Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".

The preforms may not be classified as incomplete or unfinished optical fiber under EN GRI Rule 2(a)(II) because they do not have the approximate shape or outline of the finished article (the preforms are relatively thick and inflexible; optical fiber is very thin and flexible). Preforms are "[s]emi-manufactures not yet having the essential shape of the finished articles", just as in the second paragraph of EN GRI Rule 2(a)(II), above (note the reference to semi-manufactures such as "bars" above, note also that the dictionary definition of "rod", *supra*, includes bars). This also supports treatment of the preforms as other than incomplete or unfinished optical fiber. Furthermore, we note that the parenthetical exception for bottle preforms of plastics in the first paragraph of EN GRI Rule 2(a)(II), added to the EN by amendment in 1997 (CCC Document 41.285 E, August 7, 1997) adds support to the position that the glass preforms in this case are not incomplete or unfinished optical fiber (*i.e.*, the ENs were specifically amended to provide for the classification of the bottle preforms as incomplete or unfinished articles and although the analogous issue for the glass preforms was quite thoroughly considered (see CCC Documents 31.738, 31.820, and 32.550/32.551, Annex D/9, referred to above), no such provision was made for the glass preforms).

A comment received in response to the notice in the July 1, 1998, CUSTOMS BULLETIN cited Court decisions (principally *Superior Wire v. United States*, 11 CIT 608, 669 F. Supp. 472 (1987), *affirmed* 7 Fed. Cir. (T) 43, 867 F.2d 1409 (1989)) on substantial transformation in regard to classification of the glass preforms as incomplete or unfinished optical fiber in subheading 9001.10.00, HTSUS. We do not believe that such decisions are necessarily relevant. In any case, we believe that the facts in *Superior Wire* are distinguished from the facts in this case. In *Superior Wire*, the Court held that wire rod which had been cold drawn into wire, with a reduction in cross-sectional area of about 30% but the strength characteristic unchanged, as metallurgically predetermined in the manufacture of the wire rod, was not substantially transformed for purposes of the applicability of a voluntary restraint agreement (VRA). Cold drawing of wire is a relatively simple process, basically involving only the drawing (or pulling) of material through dies (see *McGraw-Hill Encyclopedia of Science & Technology*, vol. 5, 406 (1987), **Drawing of metal**). The production of optical fiber from a preform involves drawing the preform through a furnace heated at very high temperatures and the encasement of the glass fiber in several protective layers (see FACTS, above). The effect of the cold drawing on the form of the wire rod in *Superior Wire*, was a reduction in its cross-sectional area of approximately 30%, whereas the preforms are reduced in diameter from 62 millimeters to a "hair-thin strand" (USITC Publication 2851, *supra*, 1; see also *Fiber Optic Reference Guide*, *supra*, at 27, describing popular fiber core/cladding sizes). As noted above, the length of the preforms is also very significantly changed (a single preform can yield more than 30 miles of fiber).

Accordingly, the preforms may not be classified as unworked glass in rods in subheading 7002.20.10, HTSUS, because they are worked. Neither may the preforms be classified in subheading 9001.10.00, HTSUS, as incomplete or unfinished optical fiber (because the preforms do not have the essential character of optical fiber, and on the basis of EN GRI Rule 2(a)(II)). Therefore, we conclude that the preforms are classifiable under the provision for other articles of glass, other, in subheading 7020.00.60, HTSUS.

Holding:

The glass preforms are classifiable as other articles of glass in subheading 7020.00.60, HTSUS, and not as unworked glass in rods in subheading 7002.20.10, HTSUS, or incomplete or unfinished optical fibers in subheading 9001.10.00, HTSUS.

Effect on Other Rulings:

NY B85983 dated June 18, 1997, is **REVOKED**. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF THREE RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF MEN'S BOTTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of two tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking three rulings pertaining to the tariff classification of men's bottoms. Notice of the proposed revocation was published on August 5, 1998, in the CUSTOMS BULLETIN. One comment was received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 30, 1998.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textile Classification Branch (202) 927–1695

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 5, 1998, a notice of proposed revocation of HQ 089358, dated August 12, 1991, and HQ 089247 dated July 18, 1991, (modified by HQ 950966, dated January 27, 1992), was published in the CUSTOMS BULLETIN, Volume 32, No. 31. One comment was received in response to this notice.

In HQ 089358, dated August 12, 1991, and HQ 089247 dated July 18, 1991, men's bottoms, were held to be classifiable under subheading 6207.91.3010, HTSUS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton: other: sleepwear. The statistical annotations of HQ 089247 were modified by HQ 950966, dated January 27, 1992.

It is Customs view that the presence of side slash pockets and the lack of a fly on men's pants (or bottoms) are not indicative of a sleepwear bottom but a multi-purpose garment that may (and probably will) be worn for purposes other than sleeping. These bottoms can easily make

the transition from inside the home (in a private setting) to outside the home (and a more social environment). The lack of a fly makes them suitable for modesty purposes and the presence of pockets makes them a comfortable and useful outerwear garment to carry keys, money, identification and similar small objects. As such, we find that these garments are properly classified in heading 6203, HTSUS.

Pursuant to section 625(c){1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HQ 089358, HQ 089247, and HQ 950966 and is adopting HQ 960849 and HQ 960848 to reflect proper classification of the subject men's bottoms in heading 6203 for the reasons set forth in the CUSTOMS BULLETIN Notice of Proposed Revocation and in HQ 960848 and HQ 960849. HQ 960849 is set forth as "Attachment A" and HQ 960848 is set forth as "Attachment B" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 14, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 14, 1998.

CLA–2 RR:CR:TE 960849 SG
Category: Classification
Tariff No. 6203.42.4015 and 6203.42.4050

SYLVIA PEREZ
M.G. MAHER & COMPANY
442 Canal Street
New Orleans, LA 70130

Re: Classification of men's garments; sleepwear vs. loungewear.

DEAR MS. PEREZ:

We have reconsidered our ruling HQ 089247 dated July 18, 1991, issued in response to your March 12, 1991, letter on behalf of Roytex, Inc., requesting a classification ruling for men's bottoms pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). This letter is to inform you that after reviewing that ruling, it has been determined that the classification of that merchandise in heading 6207 is incorrect. As such, HQ 089247 is revoked pursuant to the analysis which follows below.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act (Pub. L. 103–182, 107 Stat. 2057), Customs is revoking HQ 089247 to reflect proper classification of the subject men's bottoms in heading 6203. A notice of proposed revocation of HQ 089247 was published on August 5, 1998, in the CUSTOMS BULLETIN, Vol. 32, No. 31. One comment was received in response to the notice.

Facts:

The subject merchandise consisted of two pairs of men's bottoms. One with long pants legs; the other, a pair of shorts. Both garments were constructed of a woven cotton fabric, featured a fully elasticized waistband with drawstring and side slash pockets. Neither garment had a fly.

HQ 089247 classified the garments under subheading 6207.91.3000, HTSUS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton, other.

Issue:

Whether the subject merchandise is properly classifiable as sleepwear under Heading 6207, HTSUS, or as outerwear garments under Heading 6203, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6207, HTSUS, provides for, *inter alia*, men's nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping. One-piece garments such as sleep shorts and sleep pants used for sleeping are not classifiable as pajamas, instead they fall into a residual provision within heading 6207, HTSUS, for similar articles.

If it is determined that the subject bottoms are classifiable as outerwear or loungewear, the applicable heading is heading 6203, HTSUS, which provides for, *inter alia*, men's trousers.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in three court cases that addressed sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear.

Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under heading 6204, HTSUS, or as "underwear" under heading 6208, HTSUS. The court stated the following, in pertinent part:

> [p]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be.

Furthermore, we bring your attention to *International Home Textile, Inc.*, Slip Op. 97–31, March 18, 1997, which classified similar garments without a fly as loungewear in heading 6103, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-pri-

vate activities in and around the house—e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like * * *.

With respect to the bottoms which were the subject of HQ 089247, they feature no fly and side slash pockets. It is now the opinion of this office that bottoms with the combination of those two features are not sleepwear bottoms but multi-purpose garments that may (and probably will) be worn for purposes other than sleeping. These bottoms can easily make the transition from inside the home (in a private setting) to outside the home (and a more social environment). The lack of a fly makes them suitable for modesty purposes and the presence of pockets makes them a comfortable and useful outerwear garment to carry keys, money, identification and similar small objects. Additionally, even if the garments were to lack both the fly and the side slash pockets, the absence of the fly on the bottoms is indicative of a multi-purpose garment. See HQ 960432, dated August 22, 1997, in which we held that bottoms with a combination of no fly and side seam pockets, garments substantially identical to that at issue here, were not sleepwear bottoms but a multi-purpose garment classified in heading 6203, HTSUS.

Accordingly, we find that these garments are properly classified in heading 6203, HTSUS.

Holding:

The bottoms without a fly and with side slash pockets are more properly classified as follows: The pants are classified in subheading 6203.42.4015, HTSUSA, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Trousers and breeches: Men's: Other." The applicable rate of duty is 17.3 percent ad valorem and the quota category is 347.

The shorts are classifiable in subheading 6203.42.4050, HTSUSA, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Shorts: Mens." The applicable rate of duty is 17.3 percent ad valorem and the quota category is 347.

HQ 089247 is hereby revoked.

The statistical annotations of HQ 089247 were modified by HQ 950966, dated January 27, 1992. HQ 950966 is also revoked.

In accordance with title 19 U.S.C. 1625(c)(1), this ruling will become effective for articles entered for consumption or withdrawn from warehouse for consumption 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 14, 1998.

CLA–2 RR:CR:TE 960848 SG
Category: Classification
Tariff No. 6203.42.4015 and 6203.42.4050

BETH RING, ESQ.
SANDLER, TRAVIS & ROSENBERG, P.A.
505 Park Avenue
New York, NY 10022

Re: Classification of men's garments; sleepwear vs. loungewear.

DEAR MS. RING:

We have reconsidered our ruling HQ 089358 dated August 12, 1991, issued in response to your firm's April 29, 1991, letter on behalf of PGA Apparel Industries, requesting a classifi-

cation ruling for men's bottoms pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). This letter is to inform you that after reviewing that ruling, it has been determined that the classification of that merchandise is heading 6207 is incorrect. As such, HQ 089358 is revoked pursuant to the analysis which follows below.

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), Customs is revoking HQ 089358 to reflect proper classification of the subject men's garments in heading 6203. A notice of proposed revocation of HQ 089358 was published on August 5, 1998, in the CUSTOMS BULLETIN, Vol. 32, No. 31. One comment was received in response to the notice.

Facts:

The subject merchandise consisted of two pairs of men's bottoms. One with long pant legs; the other, a pair of shorts. Both garments were constructed of 100 percent flannel fabric and had neither pockets nor fly.

HQ 089358 classified the garments under subheading 6207.91.3010, HTSUS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton: other: sleepwear.

Issue:

Whether the subject merchandise is properly classifiable as sleepwear under heading 6207, HTSUS, or as outerwear garments under heading 6203, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6207, HTSUS, provides for, *inter alia*, men's nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping. One-piece garments such as sleep shorts and sleep pants used for sleeping are not classifiable as pajamas, instead they fall into a residual provision within heading 6207, HTSUS, for similar articles.

If it is determined that the subject bottoms are classifiable as outerwear or loungewear, the applicable heading is heading 6203, HTSUS, which provides for, *inter alia*, men's trousers.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in three court cases that addressed sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under heading 6204, HTSUS, or as "underwear" under heading 6208, HTSUS. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be.

Furthermore, we bring your attention to *International Home Textile, Inc.*, Slip Op. 97–31, March 18, 1997, which classified similar garments without a fly as loungewear in heading 6103, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipu-

lated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house—e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like. * * *

With respect to the bottoms which were the subject of HQ 089358, they feature no fly and no pockets. It is now Customs view that the lack of a fly on mens pants (or bottoms) makes them suitable for modesty purposes. It is not indicative of a sleepwear bottom but a multi-purpose garment that may (and probably will) be principally worn for the type of non-private activities named in *International Home Textiles, Inc.* Finally, although the garment may be worn to bed for sleeping, it is our opinion that their principal use is for "home comfort" and lounging. In addition, these bottoms can easily make the transition from inside the home (in a private setting) to outside the home (and a more social environment). See for example HQ 960432 dated August 22, 1997, in which we held that the lack of a fly on similar bottoms was indicative of multi-purpose garments which will be worn for purposes other than sleeping. Therefore, following both HQ 960432 and the decision in *International Home Textiles, Inc.*, the bottoms at issue are properly classified in heading 6203, HTSUS.

Holding:

The bottoms without a fly and without pockets are more properly classified as follows: The pants are classified in subheading 6203.42.4015, HTSUS, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Trousers and breeches: Men's: Other." The applicable rate of duty is 17.3 percent ad valorem and the quota category is 347.

The shorts are classifiable in subheading 6203.42.4050, HTSUS, which provides for "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Shorts: Mens." The applicable rate of duty is 17.3 percent ad valorem and the quota category is 347.

HQ 089358 is hereby revoked.

In accordance with title 19 U.S.C. 1625(c)(1), this ruling will become effective for articles entered for consumption or withdrawn from warehouse for consumption 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Raymond F. Burghardt

(Slip Op. 98–127)

BOUSA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00658

(Dated August 28, 1998)

ORDER

MUSGRAVE, *Judge:* Defendant moves to amend the Opinion and Order issued in this action as Slip Op. 98–105 (July 21, 1998). In that Opinion and Order, the Court denied plaintiff's motion for summary judgment as to Entry Nos. 4602–86–103263–1, 1001–458–0000104–7, and 1001–458–0000565–9. The Court granted plaintiff's motion for summary judgment as to Entry No. 4602–86–101202–0 based upon a finding that Customs had reliquidated that entry at the rate desired by plaintiff. Entry No. 4602–86–101202–0 was then severed and dismissed from this action. Defendant now contests the Court's decision to grant summary judgment as to Entry No. 4602–86–101202–0. However, defendant does not contest the Court's decision to sever and dismiss Entry No. 4602–101202–0 from this action.

The Court finds that its decision to grant summary judgment as to Entry No. 4602–86–101202–0 was appropriate, and having been properly severed and dismissed, Entry No. 4602–101202–0 is no longer at issue in this action.

Therefore, upon reading defendant's Motion for Amendment of Judgment and upon due consideration of all other papers and proceedings had herein, it is hereby

ORDERED that defendant's Motion for Amendment of Judgment be, and hereby is, denied.

(Slip Op. 98–128)

DIACHEM INDUSTRIES LTD., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 96–05–01386

On classification of an aqueous dispersion of anthraquinone with other ingredients, summary judgment for the Defendant.

(Decided September 4, 1998)

Reed Smith Shaw & McKay (James K. Kearney), for Plaintiff.
Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert)*; Office of Associate Chief Counsel, United States Customs Service, *(Mitra Hormozi)*, of counsel, for Defendant.

OPINION

BARZILAY, *Judge:* Plaintiff, Diachem Industries Ltd. ("Diachem"), commenced this action challenging the classification of its imported merchandise by the United States Customs Service ("Customs"). This Court has jurisdiction under 28 U.S.C. § 1581(a) (1994). The parties have cross-moved for summary judgment. Based upon the papers submitted, the Court finds the following material facts are not in dispute.

BACKGROUND

DIAQ is an aqueous dispersion of Anthraquinone and other ingredients: small amounts of DOWFAX 2A1, sodium, hexametaphosphate, xanthan gum and soda ash. *Pl.'s Stat. Mat. Facts* at ¶ 11. Anthraquinone is a separately defined organic compound and is used as a catalyst in the pulp and paper industry in kraft pulping, a step in the paper-making process. *Id.* at ¶ 3. Anthraquinone is an aromatic substance as it is a derivative of anthracene, a component of coal tar. *Pl.'s Attach. B* at ¶ 10. *See also Def.'s Mem. Supp. Mot. Sum. J.* at 16, n.8 *("Def's Mem.")*. Anthraquinone is poorly soluble in water and it is formulated in DIAQ along with other ingredients to help sustain the Anthraquinone particles throughout the mixture. *Compl.* at ¶¶ 17, 25. Though Anthraquinone in solid form can be used as a catalyst by the pulp and paper industry, an aqueous dispersion such as DIAQ is easier to use because dispersions are fluid and can be transported through pipes by pumping and can be readily applied and metered. *Compl.* at ¶ 20. DIAQ is a catalytic preparation, *compl.* at ¶ 14, and a reaction accelerator. *Def.'s Stat. Addit. Mat. Facts* at ¶ 48. It is a redox (oxidation-reduction) catalyst preparation used as a reaction accelerant in kraft pulping. *Def.'s Mem.* at Ex.2 (Diachem's response, dated October 12, 1994, to U.S. Customs' Request for Information pursuant to 19 CFR 151.11, 152.2, (CF 28)). DIAQ is not a supported catalyst. *Def.'s Stat. Addit. Mat. Facts at ¶49.*

Customs classified DIAQ under subheading 3815.90.50, Harmonized Tariff Schedule of the United States ("HTSUS"), as a reaction initiator,

reaction accelerator and catalytic preparation. Diachem claims that DIAQ should be classified as Anthraquinone under HTSUS 2914.61.00. For the reasons set out in the opinion which follows, the Court denies Diachem's motion for summary judgment and grants Customs' motion for summary judgment upholding its classification of the merchandise. The relevant statutes, including headnotes, are set out below.

RELEVANT STATUTES

Harmonized Tariff Schedule of the United States (1995):

Chapter 29

Notes

1. Except where the context otherwise requires, the headings of this chapter apply only to:

(a) Separate chemically defined organic compounds, whether or not containing impurities;

(b) Mixtures of two or more isomers of the same organic compound (whether or not containing impurities), except mixtures of acyclic hydrocarbon isomers (other than stereoisomers); whether or not saturated (Chapter 27);

(c) The products of heading 2936 to 2939 or the sugar ethers and sugar esters, and their salts, of heading 2940, or the products of heading 2941, whether or not chemically defined;

(d) Products mentioned in (a), (b) or (c) above dissolved in water;

(e) products mentioned in (a), (b) or (c) above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than for general use;

(f) The products mentioned in (a), (b), (c), (d) or (e) above with an added stabilizer (including an anticaking agent) necessary for their preservation or transport;

(g) The products mentioned in (a), (b), (c), (d), (e) or (f) above with an added antidusting agent or a coloring or odoriferous substance added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for specific use rather than for general use;

(h) The following products, diluted to standard strengths, for the production of azo dyes; diazonium salts, couplers used for these salts and diazotizable amines and their salts.

Heading/Subheading	*Article Description*
2914	Ketones and quinones whether or not with other oxygen function, and their halogenated, sulfonated, nitrated or nitrosated derivatives;
* * * * * * *	
	Quinones:
2914.61.00	Anthraquinone
Chapter 38	
3815	Reaction initiators, reaction accelerators and catalytic preparations, not elsewhere specified or included:
	Supported catalysts:
3815.11.00	With nickel or nickel compounds as the active substance
3815.12.00	With precious metal or precious metal compounds as the active substance.
3815.19.00	Other
3815.90	Other:
	Consisting wholly of inorganic substances: Of bismuth, of tungsten or of vanadium
3815.90.20	Of mercury or of molybdenum
3815.19.30	Other
3815.90.50	Other:

CONTENTIONS OF THE PARTIES

Diachem contends that the heading "Anthraquinone" is an *eo nomine* designation and that it should be read to include all forms of the product, so long as the form bears any essential resemblance to the one described. Thus, Diachem asserts that DIAQ is a form of Anthraquinone and that it is classifiable under tariff item 2914.61.00.

Diachem admits that DIAQ is not a separate chemically defined compound or chemical solution as described in Headnotes 1(a) and (d) of Chapter 29, but claims that because DIAQ is an aqueous dispersion of Anthraquinone, an organic compound, and a liquid made up mostly of Anthraquinone, it is Anthraquinone. Diachem argues that Anthraquinone defines the essential character of DIAQ and that the minor constituents in DIAQ do not play a direct role in the principal function of Anthraquinone. Moreover, Diachem contends that the minor ingredients are not present in DIAQ in quantities sufficient to be significant for tariff purposes. Diachem also contends that Headnotes 1(d) and 1(e) to Chapter 29 require classification of DIAQ under 2914.61.00. With regard to Headnote 1(d), Diachem admits that DIAQ is not a separate chemically defined compound or a chemical solution, but contends that "there is no practical distinction between dispersions and solutions because the two formulations have analogous industrial functions in providing normally solid chemicals in fluid form to facilitate the

distribution of solid chemicals." *See Pl.'s Mem. Supp. Sum. J. ("Pl.'s Mem.")* at 11–12. In discussing DIAQ with regard to Headnote 1(e), Diachem argues that Anthraquinone is dispersed in water, as in DIAQ, solely to minimize safety and health hazards and to facilitate transport and distribution. Diachem also contends that the Anthraquinone in DIAQ remains suitable for general industrial applications and that the DIAQ dispersion does not render the Anthraquinone particularly suitable for a specific use rather than for general use.

Diachem also argues that the common and commercial meaning of Anthraquinone includes aqueous dispersions such as DIAQ. *Pl.'s Mem.* at 13. Diachem states that the pulp and paper industry purchases Anthraquinone exclusively in liquid or semi-liquid forms, not in tablet form. *Id.* at 14. In addition, DIAQ is marketed and sold as Anthraquinone, and pulp and paper industries purchase DIAQ with the understanding and expectation that they are purchasing Anthraquinone only. Thus, Diachem proposes that the more specific classification for DIAQ is found under Chapter 29 of the HTSUS rather than under Chapter 38 as determined by Customs, because the classification of Anthraquinone is more specific than the Customs' "all others" classification. *Pl.'s Mem.* at 20.

Customs argues that DIAQ is properly classified under the "all others" classification of Chapter 38 under the category of "reaction initiators, reaction accelerators and catalytic preparations, not elsewhere specified or included." *See Def.'s Mem.* at 7. Customs contends that DIAQ consists of several separate chemically defined compounds, and, therefore, is not a separate chemically defined compound dissolved in either water or another solvent as described by the chapter notes of HTSUS Chapter 29. *Id.* at 9–10. Customs argues that DIAQ is not a solution, but a complex mixture. *Id.* at 12. Customs also contends that the terms "dispersion" and "solution" are not synonymous and that the legislature intended only solutions to be included in Chapter 29. *Id.* at 11–12.

Customs refutes Diachem's argument that DIAQ is properly classifiable as Anthraquinone, an *eo nomine* classification, stating that the language of the Chapter 29 notes clearly preclude classifying formulations of Anthraquinone with other ingredients in that chapter. The language specifically permits only "separate chemically defined organic compounds" to be classified in Chapter 29. Customs asserts that its classification under 3815.90.50 is appropriate because it describes what DIAQ is: a catalytic preparation. *Id.* at 15.

The Standard of Review

This case is before the Court on the parties' cross motions for summary judgment. Under USCIT R. 56(d), summary judgment is appropriate if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Both parties posit that this case is ripe for adjudication by means of summary judgment. This Court agrees. Even though there are minor differences in the factual positions advanced by each party, summary judgment is appropriate in this action because there are no genuine issues of material fact in dispute. The parties agree on the basic details of the imported merchandise, but dispute the classification. Thus, the material facts of what the merchandise is and what it does are not at issue. *See Bausch & Lomb, Inc. v. United States*, ____ CIT ____, 957 F. Supp. 281, 284 (1997), *aff'd*, 1998 U.S. LEXIS 15175 (Fed. Cir. 1998). This Court is then left with the purely legal question involving the meaning and scope of the tariff provision and whether it includes the imported merchandise. *See National Advance Systems v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994).

Although there is a statutory presumption of correctness for Customs' decisions, 28 U.S.C. § 2639(a)(1) (1994), when the Court is presented with a question of law in a proper motion for summary judgment, that presumption does not apply. *Blakley Corp. v. United States*, Slip. Op. 98–94 ____CIT____ (1998), (quoting *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) ("[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant.")) *See also Goodman Manufacturing L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995).

Therefore this Court must examine both parties' claimed classifications and independently determine which of them is correct, or if neither, take further measures to determine the correct classification. 19 U.S.C. 2643(b) (1994).

DISCUSSION

In determining the meaning and scope of the tariff provision, this Court is required by the General Rules of Interpretation of the Harmonized Tariff Schedule ("GRI") to determine classification "according to the terms of the headings and any relative section or chapter notes." GRI 1. If the chapter notes and headings are dispositive, the Court need not engage in the analysis of subordinate rules and other interpretation. *See, e.g., Alcan Aluminum Corp. v. United States*, ____ CIT ____, 986 F. Supp. 1436, 1443 (1997).

Note 1(a) to Chapter 29 provides that, "[e]xcept where the context otherwise requires, the headings of this Chapter apply only to separate chemically defined organic compounds." The remaining portions of Note 1, respectively, provide for products mentioned in Note 1(a):

> "dissolved in water," Note 1(d); or
>
> "dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than for general use," Note 1(e); or

"with an added stabilizer * * * necessary for their preservation or transport," Note 1(f); or

"with an antidusting agent * * * for safety reasons" Note 1(g).

Therefore, in determining the proper classification of the imported product, DIAQ, this Court must determine, in the first instance, whether it is a separate chemically defined organic compound.

The parties agree that DIAQ is not a separate chemically defined organic compound, but Diachem argues that because the Anthraquinone in DIAQ retains its identity as a separate chemically defined compound, the product falls under the Chapter 29 designation of Anthraquinone. Diachem argues that DIAQ is known by the pulp and paper industry as Anthraquinone. As such, DIAQ should be entitled to classification as Anthraquinone under a doctrine which enunciates that if a product is generally and definitely known, bought and sold under a particular identity, it is classified as such for tariff purposes. Diachem relies upon *Aldrich Chemical Co., Inc. v. United States*, 297 F. Supp. 1389 (Cust. Ct. 1969) (classification of thioacetic acid as other acids or sulfur compounds including thiols) and *New York Merchandise Co., Inc. v. United States*, 294 F. Supp. 971 (Cust. Ct. 1969) (classification of vinyl baseball gloves as other toys or baseball equipment) for this proposition. Diachem also argues that the minor ingredients included in DIAQ do not affect the essential character of Anthraquinone because those ingredients neither chemically react with a compound nor do they enhance its catalytic properties. In support of this argument, Diachem relies upon a line of cases decided under the Tariff Schedules of the United States ("TSUS") determining what role minor ingredients play in the tariff classification of chemical products. *See, e.g., Aceto Chemical Company v. United States*, 408 F. Supp. 1389 (Cust. Ct. 1975); *Cavalier Shipping Co. v. U.S.*, 337 F. Supp. 447 (Cust. Ct. 1971).

The Court finds these arguments unpersuasive. In order to be classifiable within Chapter 29, DIAQ must satisfy the specific dictates of Chapter 29, Note 1. As constituted upon importation, DIAQ is not described by Note 1 and therefore, is precluded from classification within Chapter 29. For guidance on the meaning of Chapter 29, Note 1, this Court turns to the explanatory notes to the Harmonized Commodity Description and Coding System ("Explanatory Notes") which are "generally indicative of the proper interpretation of [the Harmonized Tariff System] * * *." *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. CONF. REP. NO. 576, at 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582.) As stated in the Explanatory Notes: "[a] separate chemically defined compound is a single chemical compound of known structure which does not contain other substances deliberately added during or after its manufacture (including purification)." *Harmonized Commodity Description and Coding System, Explanatory Notes* at 326 (1st ed. 1986). The imported merchandise, DIAQ, is not a single chemical compound. It consists of several chemically defined compounds, for example: Anthraquinone, water, sodium, hexametaphos-

phate and soda ash. DOWFAX 2A1 and xanthan gum themselves consist of several chemically defined compounds. Therefore, DIAQ does not fit within Note 1(a).

Because DIAQ does not satisfy the criteria specified by Note 1(a), it cannot satisfy the Note 1(d) and (e) criteria. The parties have both discussed at length the meanings and legal significance of the terms "solution" and "dispersion." However, these discussions are not relevant, as it is clear that because DIAQ is not a separate chemically defined organic compound, it cannot be classified pursuant to Notes 1(d) or (e) regardless of whether, as an aqueous dispersion of Anthraquinone, it is legally or scientifically equivalent to a solution.

This Court must also reject Diachem's argument that DIAQ should be classified under the *eo nomine* provision for Anthraquinone. The Court faced a similar decision in *H. Reisman Corp. v. United States*, 17 CIT 1260, 1264 (1993). The disputed merchandise in the *Reisman* case was a vitamin B–12 animal feed preparation. *Id.* at 1260. The importer claimed that the merchandise should be classified as "other vegetable material of a kind used in animal feeding" or "other preparations of a kind used in animal feeding." *Id.* at 1260–61. Customs claimed that the merchandise should be classified under Chapter 29 of the HTSUS as vitamin B–12 because such a classification was *eo nomine*. *Id.* at 1264. The Court found that the merchandise did not fall under an *eo nomine* classification for vitamin B–12 because it did not fit into the explanatory headnotes of Chapter 29. *Id.* at 1262–64. The Court also found the merchandise was a formulation of two organic compounds (two different forms of vitamin B–12), substantial quantities of proteinaceous materials, and other substances while the explanatory headnotes identified only "separate chemically defined organic compounds," "mixtures of two or more isomers of the same organic compound," or either of the previous two products dissolved in water or other solvents. The Court concluded that the merchandise was not vitamin B–12 and that the entire chapter did not apply to the merchandise. *Id.* at 1264. The Court explained that the merchandise fell outside the scope of the chapter because it consisted of an eluate of two separate organic compounds which were derived from the manufacture of vitamin B–12. *Id.* at 1263–64. The Court declined to classify the merchandise as vitamin B–12 holding that the entire Chapter 29 was not applicable to the product. *Id.* at 1264–65.

The situation here is directly analogous. Although DIAQ contains Anthraquinone, it cannot be classified under Chapter 29 because the product is not a separate chemically defined organic compound in its condition as imported. Here, the presence of the other materials: DOWFAX 2A1, hexametaphosphate, xanthan gum and soda ash, each in themselves separate chemically defined organic compounds, precludes classification of DIAQ as Anthraquinone. Therefore, DIAQ is not classifiable within Chapter 29 of the Harmonized Tariff Schedules.

This Court next turns to an examination of Customs' classification of DIAQ within heading 3815 HTSUS at subheading 3815.90.50. Heading 3815 describes reaction initiators, reaction accelerators and catalytic preparations not elsewhere specified or included. In our previous analysis on Chapter 29, we noted that we must consider the General Rules of Interpretation and GRI 1. GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." There are no applicable Chapter 38 section or chapter notes precluding classification of DIAQ within 3815. Even though Chapter 38, Note 1(a) precludes classification within Chapter 38 of separate chemically defined compounds, because DIAQ is not a separate chemically defined compound, Note 1(a) cannot govern its classification.

Subheading 3815.90.50, HTSUS describes: "Reaction initiators, reaction accelerators and catalytic preparations, not elsewhere specified or included: Supported catalysts: * * * Other: * * * Other." The terms of subheading 3815.90.50 specifically provide for reaction accelerators and catalytic preparations. As a catalytic preparation and reaction accelerator, DIAQ performs the functions of articles described in subheading 3815.90.50.

The Explanatory Notes to heading 3815 provide further support that DIAQ is properly classifiable under subheading 3815.90.50. These notes state that heading 3815 covers preparations which initiate or accelerate certain chemical processes including free radical catalysts (e.g., organic solutions of redox mixtures). *See Explanatory Notes* at 537. As noted in the finding of material facts, Diachem's own descriptive literature states that DIAQ is a redox (oxidation-reduction) catalyst preparation used as a reaction accelerant in kraft pulping.

In addition, DIAQ is described within subheading 3815.90.50 inasmuch as it is not a "supported catalyst," within the meaning of subheadings 3815.11.00, 3815.12.00, and 3815.19.00. *See Explanatory Notes* at 537 (defining the term "supported catalyst."[1]) DIAQ is also precluded from classification in subheadings 3815.90.10, 3815.90.20 and 3815.90.30 because it contains Anthraquinone, an organic compound, so DIAQ does not "consist[] wholly of inorganic substances" as is descriptive of the products included within those subheadings.

Alternatively, in its complaint (but not advanced in its summary judgment motion), Diachem claims that DIAQ is classifiable within subheading 3809.92.50. That claim cannot be sustained. Subheading 3809.92.50, by its terms, covers products which do not contain 5 percent or more by weight of aromatic substances. Inasmuch as DIAQ contains more than 5 percent by weight of Anthraquinone, and Anthraquinone is

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[1] [c]omposed either of one or more active substances deposited on a support * * * or of mixtures with a basis of active substances. In the majority of cases, these active substances are certain metals, metallic oxides, other metallic compounds or mixtures thereof. The metals most frequently used as such or as compounds are cobalt, nickel, palladium, platinum, molybdenum, chromium, copper or zinc. The support, sometimes activated, generally consists of alumina, carbon, silica gel, siliceous fossil meal or ceramic materials. Examples of supported 'catalysts' are supported Ziegler or Ziegler-Natta types.

an aromatic substance, DIAQ is not classifiable within subheading 3809.92.50. DIAQ, therefore, is described within heading 3815, inasmuch as it satisfies the terms of that heading, and it is not elsewhere specified or included.

CONCLUSION

Therefore, the Court rules that U.S. Customs correctly classified the imported merchandise, DIAQ, under the subheading 3815.90.50, HTSUS.

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